

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SARA JANE JOHNSON,

Defendant-Appellee.

UNPUBLISHED

October 11, 2005

No. 254329

Oakland Circuit Court

LC No. 2003-193037-FH

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion to dismiss for prearrest delay. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's decision to dismiss for prearrest delay is reviewed for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001). To the extent "the claim implicates constitutional due process, our review is de novo, while the factual findings of the trial court are reviewed for clear error." *People v Tanner*, 255 Mich App 369, 412; 660 NW2d 746 (2003), rev'd on other grounds 469 Mich 437 (2003) (citations omitted).

"Mere delay between the time of the commission of an offense and arrest is not a denial of due process. There is no constitutional right to be arrested. Rather, the guideline is whether the record presents evidence of prejudice resulting from the delay which violates a defendant's right to procedural due process." *People v Anderson*, 88 Mich App 513, 515; 276 NW2d 924 (1979) (citations omitted). "Before dismissal may be granted because of prearrest delay there must be actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecution to gain a tactical advantage." *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). Substantial prejudice is that which meaningfully impairs the defendant's ability to defend against the charges "in such a manner that the outcome of the proceedings will likely be affected." *Id.* Once the defendant meets the initial burden of demonstrating prejudice, the burden then shifts to the prosecutor to explain the delay. *Tanner, supra* at 414.

The trial court dismissed the charges on the basis that defendant's ability to defend against the charges was meaningfully impaired, and the court was "not persuaded that the reason for the delay is sufficient to justify the prejudice." Given the record below, we conclude that the

court abused its discretion in dismissing the charges because defendant failed to show actual and substantial prejudice sufficient to shift the burden of proof to the prosecutor.

Defendant argued that she was prejudiced by the prearrest delay because she had continued to pursue her goal of becoming a nurse by taking prerequisite classes for nursing, and she was on the waiting list for nursing school; however, she would be precluded from attaining licensure as a nurse if convicted of a felony. Thus, had this case been timely pursued by the prosecutor, defendant would have altered her career aspirations. Defendant's expenditure of time and money on a career goal does not constitute prejudice to sustain a due process violation. Defendant's career pursuits are unrelated to her ability to defend against the charges.

Defendant also argued that she was prejudiced by the possible destruction of the blood sample drawn the night of the incident. The loss of exculpatory evidence that could not be obtained by other means is an example of substantial prejudice. *People v Adams*, 232 Mich App 128, 136; 591 NW2d 44 (1998). In this case, whether the blood sample was destroyed at the time dismissal was sought was disputed. In any event, there was no indication that the defense sought or relied on this evidence.

Defendant further argues that the delay resulted in her inability to recall possible res gestae witnesses and to prepare a proper defense. Given the record, any prejudice in this regard is merely speculative. "Actual prejudice is not established by general allegations or speculative claims of faded memories, missing witnesses, or other lost evidence." *Tanner, supra* at 414.

Defendant has failed to satisfy the threshold requirement of actual and substantial prejudice. *Adams, supra* at 139. Moreover, defendant failed to show that plaintiff intentionally delayed her arrest to secure a tactical advantage. The trial court abused its discretion in granting defendant's motion to dismiss.

Reversed and remanded for reinstatement of the charges. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Pat M. Donofrio